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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Part 20 and 24 of the
Commission's Rules – Broadband
PCS Competitive Bidding and the
Commercial Mobile Radio Service
Spectrum Cap

Amendment of the Commission's
Cellular PCS Cross-Ownership Rule.

WT Docket No. 96-59

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GN Docket No. 90-314

COMMENTS OF NEW DAKOTA INVESTMENT TRUST

New Dakota Investment Trust ("New Dakota") hereby submits its Comments in response to the proposals set forth in the Commission's *Notice of Proposed Rulemaking* in the captioned proceeding.¹ New Dakota respectfully urges the Commission (i) to conduct a separate auction for the F block Personal Communications Services ("PCS") licenses after the conclusion of the auction for the D and E block licenses and (ii) to modify the definition of small business for purposes of the F block auction so that the maximum bidding credits and most advantageous installment payment plans are available only to businesses with net worth and average annual profits falling below the Small Business Administration levels originally adopted by the Commission.

¹Notice of Proposed Rule Making (Amendment of Part 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap (WT Docket No. 96-59); Amendment of the Commission's Cellular PCS Cross-Ownership Rule (GN Docket No. 90-314)), FCC 96-119 (released March 20, 1996) ("Bidding/Spectrum Cap NPRM").

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I. INTRODUCTION

New Dakota participated in the C block broadband PCS auction, having filed a Form 175 and made an up-front payment in the amount of \$2.5 million.² In view of the high amounts of the bids on the 30 MHz Basic Trading Area ("BTA") markets, New Dakota withdrew from the auction. New Dakota determined that the aggressive bidding patterns and the apparent depth of the resources of some of the participants signalled ultimate prices that were too high for New Dakota's business and investment strategies. Because of the smaller spectral bandwidth of the remaining PCS blocks (and in particular the F block) and the lower prices that are expected to be bid for those licenses, New Dakota plans to bid aggressively in the subsequent auctions. Some of the niche services that can be accommodated by the 10 MHz licenses are also within the particular business plan and expertise of New Dakota. Interested persons in New Dakota hold construction permits for several markets and have been active participants in the 39 GHz regulatory arena. The 39 GHz licenses can be used in conjunction with PCS to promote the breadth and rapid deployment of New Dakota's service offerings. New Dakota draws upon its PCS auction experience and background in 39 GHz in recommending a reasoned approach to the issues set forth herein.

²FCC Account Number 0466073299, application accepted for filing by Public Notice, Report No. AUC-95-05, Auction No. 5.

II. ARGUMENT

A. The F Block Licenses Should Be Auctioned After the D and E Block Licenses.

The Commission sought comment on whether to auction the 10 MHz F block licenses together with the other 10 MHz D and E block licenses, tentatively concluding that it should auction the D, E, and F frequency blocks concurrently in a simultaneous multiple round auction. *Bidding/Spectrum Cap NPRM* at 37-38 paras. 84-86. New Dakota strongly urges the Commission to auction the F block licenses in a separate auction scheduled after the D and E block licenses have been auctioned.

In the first place, an auction of the D, E and F blocks at one time (which would entail a simultaneous auction of 1,479 licenses) runs the risk of creating excessive administrative complexity for the bidders and for the Commission. See News Release, FCC Announces Date for First Entrepreneurs' Block Auction, December 23, 1994 (Commission cited these same reasons in stating that it was preferable to auction the C and F entrepreneurs' licenses separately).

Secondly, a simultaneous auction of the three blocks could only promote the opportunities for large companies to aggregate the blocks to the detriment of smaller businesses that planned to bid on and obtain a single 10 MHz license for the provision of those niche services that would be accommodated by the narrower spectrum. The experience in the A and B block auction is that the 99 licenses were won by a mere 18 bidders, and the majority of the licenses were obtained by three very large companies. The course of the bidding in the C block auction indicates (notwithstanding the fact that the C block was allocated for smaller businesses) that the bidding is being dominated by a small

group of companies with apparent access to vast capital resources. The Commission has on several occasions indicated that the 10 MHz blocks would be suitable for providing services ranging from specialized or "niche" applications to services comparable to those now provided by cellular systems. See *Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services)*, GEN Docket No. 90-314, 9 FCC Rcd. 4957, 4981 para. 60 (1994). The Commission has in many instances stressed that the public benefit will be maximized by the provision of a diverse array of PCS services by a group of service providers that is as broad as possible. Section 309(j) includes among the objectives for competitive bidding "avoiding excessive concentration of licenses and . . . disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women" 47 U.S.C. § 309(j)(3)(B). New Dakota maintains that a single auction of the D, E, and F blocks will only serve to enable large companies to aggregate the 10 MHz blocks for the provision of those PCS services requiring the broadest spectrum (and, presumably, the highest level of capital investment) and will have the inevitable result of a concentration of the licenses in the hands of a small group of large companies. Small businesses will be excluded, and the public will not enjoy the benefit of the availability of the breadth of those niche services that could have arisen in the case that the 10 MHz licenses had not been aggregated.

Finally, New Dakota maintains that conducting the F block auction after the D and E block will serve to provide the small and women and minority owned businesses that will participate in the F block bidding with valuable information about the values of the 10 MHz

licenses and other matters on the basis of their observation of the D and E block auction. The Commission cited this very benefit in its justification for the time delay between the A and B block auction and the C block auction,³ and the reasoning should apply with equal force now.

B. The Threshold for Small Businesses Should Be Lowered for Purposes of the F Block Auction to the \$6 Million Net Worth and \$2 Million Annual Profits Limits Proposed by the Small Business Administration and Originally Adopted by the Commission.

The Commission has sought comment (should the F block auction rules be revised to substitute small business concepts for those based on race and gender) on whether it should revise its definition of small business. Current rules define a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average gross revenues that are not more than \$40 million for the preceding three years and total assets of less than \$500 million at the time of filing of the short form.⁴ The Commission has tentatively proposed to retain the current small business definition for the F block. *Bidding/Spectrum Cap NPRM* at 23 para. 50. On the basis of the fact that small businesses such as New Dakota have effectively been foreclosed from any meaningful opportunities in the C block PCS auction because of the apparent capital resources of many of the participants now enjoying small business status in that auction,

³See, e.g., *Fourth Memorandum Opinion and Order (Implementation of Section 309(j) of the Communications Act – Competitive Bidding)*, PP Docket No. 93-253, 9 FCC Rcd. 6858, 6863 para. 30 (1994), where the Commission stated that "the information about license values conveyed in the MTA auctions will reduce the risk of BTA financing and partnering and so will be valuable to bidders in the entrepreneurs' block auctions."

⁴Sections 24.709(a)(1) and 24.720(b), 47 C.F.R. §§ 24.709(a)(1) and 24.720(b), which currently apply to the C block licenses.

New Dakota urges the Commission to adopt a definition of small business that incorporates the lower thresholds devised by the Small Business Administration ("SBA"), as originally adopted by the Commission as the standard for small business status (see below). As described by the Commission in the *Bidding/Spectrum Cap NPRM* at 22 para. 49, these limits would be no more than \$6 million net worth and, after federal income taxes, no more than \$2 million in annual profits each year for the previous two years.

As discussed above, the experience of the C block auction thus far has been that a small group of bidders with apparent access to vast amounts of capital have dominated the bidding. Most of these very companies enjoy small business status under the current definition. Coupled with the fact that all 99 of the A and B block licenses were acquired by only eighteen bidders, and the vast majority by a mere three bidders, the direction of broadband PCS is that the spectrum will be concentrated in the hands of a small number of large companies. This is exactly the situation that Congress and the Commission have tried to avoid. Smaller, but well managed, well capitalized and innovative companies have been effectively foreclosed from entering the PCS arena.

The 10 MHz PCS licenses, because of their smaller size and expected lower cost and compatibility with niche services, represent the last opportunity for the Commission to disseminate some broadband PCS spectrum to small and women and minority owned businesses. To do so, the Commission must devise a plan that disseminates bidding credits and most favorable installment plans only to the small businesses that truly need them. The fact that larger businesses currently also have access to these benefits effectively shuts the door on smaller companies like New Dakota with a demonstrated track record in

telecommunications and a keen interest and ability to furnish innovative PCS services to the public.

New Dakota maintains that the current thresholds are simply too high to achieve their intended aims. There are many companies that do not even come close to the current total asset and gross revenue limits that would be particularly suited to obtaining a 10 MHz license and providing the niche services feasible on that bandwidth. The Commission originally adopted the SBA net worth/net income size standard "as the appropriate threshold for small businesses to qualify as designated entities," as being "high enough to encompass those entities that require the benefits, but also have the financial wherewithal to construct and operate the systems." *Second Report and Order (Implementation of Section 309(j) of the Communications Act—Competitive Bidding)*, 9 FCC Rcd. 2348, 2395-96 para. 271 (1994) ("Second R & O"). Only later did the Commission revise these limits, in light of its conclusion that the original definition "would exclude most businesses possessing the financial resources to compete successfully in the provision of broadband PCS services." *Fifth Report and Order (Implementation of Section 309(j) of the Communications Act—Competitive Bidding)*, PP Docket No. 93-253, 9 FCC Rcd. 5532, 5608 para. 174 (1994).

Experience has proven the Commission wrong in raising the small business limits. Of note is the fact that the Commission made no attempt to differentiate the resources required to compete successfully in a service based on a 30 MHz block versus a service based on a 10 MHz block. The 10 MHz F block auction represents the Commission's last opportunity to prevent the majority of the PCS licenses from being acquired by a small

number of large companies. New Dakota maintains that the best means of preventing the continuation of this trend is to restrict the maximum bidding credits and most favorable installment payment plans to the businesses that truly need them by reimplementing the original SBA limits.

III. CONCLUSION

For the reasons set forth above, New Dakota respectfully urges the Commission (i) to conduct a separate F block auction after the conclusion of the D and E block auction and (ii) to lower the thresholds for small business status for purposes of the F block auction to the limits originally proposed by the SBA and adopted by the Commission in the Second R & O.

Respectfully submitted,

NEW DAKOTA INVESTMENT TRUST

By:



Laurie L. Arthur

Authorized Representative

4513 Pin Oak Court

Sioux Falls, South Dakota 57103

Telephone: (605)338-3632

Facsimile: 338-3938